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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANCIS V. CHERRY,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where firemen have already extinguished a blaze in a residential property, but remain on the premises for "mop-up" operations, is a warrantless and nonconsensual seizure of items valid where the firemen have no reasonable belief that the items are contraband or evidence of arson, but merely seem to be "out of place?"

2. Where a residue of drugs and drug paraphernalia is found in the ruins of a property extensively damaged by fire, does a conviction based on Petitioner's mere presence at the premises prior to the fire violate due process?

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Francis V. Cherry, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on February 9, 1984.

OPINIONS BELOW

On February 9, 1984 the United States Court of Appeals for the Third Circuit filed a Memorandum Opinion, not for publication, which is not reported but is reproduced in Appendix A, *infra*, pp.A1-A6. It affirmed the judgment of conviction and sentence of imprisonment entered by the Honorable Maurice Cohill, Judge of the United States District Court for the Western District of Pennsylvania, on May 12, 1983. A copy of the Judgment and Commitment Order is reproduced herein as Appendix B, *infra*, p.A7. No opinion was filed by Judge Cohill.

A timely Petition for Rehearing En Banc was filed and, on March 12, 1984, was denied. A copy of the Order denying rehearing is reproduced in Appendix C, *infra*, p.A8.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pp.A1-A6), affirming the judgment of the District Court, was entered on February 9, 1984. A timely Petition for Reargument En Banc was denied on March 12, 1984 (Appendix C, *infra*, p.A8). This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution provides in pertinent part:

Amendment IV — Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V — Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall * * * * be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

This petition seeks review of an Order of the Court of Appeals affirming the judgment of conviction and sentence of imprisonment of five years imposed on Appellant following his conviction of one count of a two count indictment charging conspiracy to manufacture a controlled substance.

On June 22, 1982, Francis V. Cherry and John M. Berthelot[1] were indicted by a federal Grand Jury in the Western District of Pennsylvania. Cherry and Berthelot were jointly tried before the Honorable Maurice Cohill and jury in the United States District Court for the Western District of Pennsylvania on a two-count indictment alleging violations of 21 U.S.C. §841(a)(1)[2] (manufacture of a controlled substance) and 21 U.S.C. §846[3] (conspiracy to manufacture a controlled substance). The trial resulted in a guilty verdict against Cherry and Berthelot on the conspiracy charge, but both were found not guilty of manufacturing a controlled substance. On May 11, 1983, Cherry and Berthelot were separately sentenced to the maximum periods of incarceration of five (5) years.

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1. The indictment incorrectly spelled Berthelot's surname as Bertholet. The Court of Appeals entered an order amending the caption. See App. A, *infra*, p.A6.

2. Title 21, United States Code, Section 841(a)(1) provides in pertinent part:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

3. Title 21, United States Code, Section 846 states that "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Timely appeals were filed and jointly briefed by both Cherry and Berthelot. A panel of the United States Court of Appeals for the Third Circuit, which ordered the case submitted on briefs without oral argument, filed a Memorandum Opinion affirming the judgment of conviction and sentence. A timely Petition for Rehearing En Banc was denied.

The indictment encompassed a four and one-half month period between July 10, 1981, when the conspiracy was alleged to have been formed with Berthelot's purchase of a house on Annin Creek Road, in McKean County, Pennsylvania, and the alleged ending of the conspiracy when that house was destroyed by fire on November 30, 1981. Count One of the indictment alleged that the conspiracy was carried out by Berthelot acquiring possession of the house on Annin Road in McKean County on July 10, 1981. It also alleged that subsequently Berthelot and Cherry obtained possession of certain laboratory equipment which they used for the manufacture of methamphetamine. It further alleged that on November 30, 1981, Berthelot and Cherry were engaged in the manufacture of methamphetamine in the house on Annin Road. Count Two of the indictment alleged that Berthelot and Cherry did knowingly, intentionally, and unlawfully manufacture methamphetamine.

The indictment resulted from the events occurring on November 30, 1981, and the investigation which followed. On the morning of November 30, 1981, Officer William Hill of the Pennsylvania State Police responded to a call at the Little Diner in Annin Township, McKean County (R.126a-127a).[4] When Officer Hill arrived he found Berthelot sitting at a table. Mr. Berthelot's hand was bleeding profusely and his hands and clothes were covered with blood (R.128a). Hill then took Mr.

4. Reference to "R." are to the Joint Appendix filed by Berthelot and Cherry in the Court of Appeals.

Berthelot to a local hospital where his injuries were treated (R.129a).

While at the hospital Mr. Berthelot said that the injury was the result of a hunting accident. As a result of this statement District Game Protector James Rankin, whose duty includes investigation of all hunting accidents, came to the hospital to investigate (R.130a-131a). Mr. Berthelot was described by Officer Hill as being almost incoherent; Berthelot's clothing was disheveled and his behavior was described as unusual, erratic and "he seemed to be confused" (R.145a). Game Protector Rankin testified that he was acting very strangely (R.183a).

After Mr. Berthelot was treated, Rankin and Hill tried to ascertain where his hunting equipment and companions were and where the accident had taken place. Mr. Berthelot's responses indicated he did not know where his vehicle was or where he was staying (R.131a). Hill and Rankin then proceeded with Mr. Berthelot to search for his vehicle and to find out where he was residing. The group proceeded to a local motel where Mr. Berthelot indicated that he had been staying. Investigation revealed that Mr. Berthelot registered at the motel on November 28, 1981 (R.132a). As they continued to search the area for his vehicle, Berthelot "found" his pick-up truck on Annin Road near the house which was owned by his mother (R.135a).

Officer Hill and Mr. Berthelot proceeded to the front porch of the residence. Francis V. Cherry came out on the porch and Officer Hill began to question Mr. Cherry, who stated to the officer that he did not believe that Mr. Berthelot had been in a hunting accident (R.137a) but that Berthelot was on a three day drunk of some sort (R.209a). Berthelot then advised Hill that he had been in a fight with another individual, and Hill thereupon arrested Berthelot for making a false police report (R.138a).

After observing broken windows upstairs, and what was believed to be blood on the curtains, Officer Hill proceeded to the local magistrate's office to make an application for a search warrant, with Mr. Berthelot in custody. Game Protector Rankin stayed behind at Hill's request and watched the house (R.191a).

Cherry went inside and stated he was going to take a shower and clean up the house. Later, Rankin observed Cherry walk out of the building with his coat and hunting rifle, and Cherry told Rankin the house was on fire. Cherry stated that the kitchen curtains had caught on fire while he was heating water to make coffee. The fire started at approximately twelve o'clock noon at which time Rankin called the fire department. (R.202a).

The local fire department responded immediately but the house was badly damaged by the fire. Fire Chief Lawrence Brundage had been called to the scene and had directed the efforts to extinguish the fire. At approximately three o'clock (3:00 P.M.) the fire was put out and only a few walls remained standing (R.217a). Brundage entered the remains to assist in putting out "hot spots" and to determine the cause and origin of the fire (R.218a).

From his investigation Brundage determined that the fire started in the *east/northeastern* portion of the building (R.228a-230a). During his search of the remains Brundage discovered in the *southwest* portion of the building items that he did not know the identity of. Brundage then seized these items and later turned them over to Trooper McQuay, a member of the Pennsylvania State Police and the Fire Marshal for McKean County (R.223a). The items seized included glass beakers, glass tubes, heating mantels, and gas masks (R.221a-222a).

After receiving the items, Trooper McQuay, Trooper Charles Lewis and criminalist John Robertson reviewed the items seized by Brundage. On December 4, 1981, a search warrant was obtained from a district justice for

the premises based on an application and affidavit (R.122a-123a) that set forth the expert opinion of Robertson and others that these seized items were the type that would and could be used in the manufacture of illegal drugs (R.123a). Later Robertson conducted an analysis of the glass tubes seized by Brundage and found that they contained trace amounts of methamphetamine (N.T. 646, 669).[5]

On December 4, 1981, the search warrant was executed by Lewis, McQuay, Robertson and others. Various items were seized pursuant to this search warrant, including small pieces of aluminum foil, pieces of glass tubes and beakers, pieces of screen copper tubing, a portion of a laboratory catalog, and a bottle of grain alcohol (R.237a-240a).

On May 25, 1982, a federal search warrant was issued authorizing another search of the Annin Road property (R.116a *et seq.*). This search and seizure was conducted on May 26, 1982 by Agents Donald Chase and Steven Sabo of the Drug Enforcement Administration (DEA). Various items were seized during this search, including hot plates, aluminum foil, assorted pieces of glassware, and glass tubing (R.117a). The affidavit in support of this search warrant relied upon information obtained from the November 30, 1981 warrantless seizure of Fire Chief Brundage and the December 4, 1981 search and seizure (R.118a-121a).

Pretrial motions seeking the suppression of this evidence were filed and denied. Items so seized were offered at the joint trial.

Thus, the Government's evidence at trial was offered to show that the house was purchased by Berthelot (even through titled in his Mother's name); that it was destroyed by a fire of suspicious origin, when occupied

5. References to "N.T." are to portions of the Notes of Testimony of the trial which were not contained in the Record printed below.

by Cherry (while Berthelot was in custody in an intoxicated condition in a Trooper's car driving toward a Magistrate where the Trooper intended to obtain a search warrant for the premises); that items found among the ruins of the house constituted paraphernalia used in manufacturing methamphetamine, which contained traces of methamphetamine.

The only evidence connecting Cherry to the premises was that the testimony of a neighbor who testified that he had seen him outside the premises once or twice prior to the fire (although he never said on what days or during what period of time). He also never testified that he ever saw Cherry in the company of Berthelot, or that he saw them in or near the premises at the same time or on the same dates.

NO ONE TESTIFIED THAT THEY EVER SAW THE TWO APPELLANTS TOGETHER AT ANY TIME AT THE ANNIN ROAD PROPERTY; NO ONE TESTIFIED THAT THEY EVER SAW THEM TAKE ANY JOINT ACTION; AND NO ONE SAW THEM PARTICIPATE IN ANY JOINT ACTIVITY.

Although neither Defendant testified, both produced witnesses. Berthelot called his Aunt to testify that his Mother, Mrs. Olivia Fernandez, had bought this house in the mountains together with him. Mr. Cherry offered, by stipulation, the grand jury testimony of DEA Agent Chase relating to Chase's statement to Game Warden Rankin in which he said that curtains had blown into the fire on the stove and ignited the inside of the residence. He offered the testimony of a volunteer fireman, who was also a gasman, who turned off the gas on the property before the fire fighters arrived on the scene.

Mr. Cherry also offered the testimony of one neighbor to contradict the testimony of another neighbor who had testified on behalf of the Government that he had observed that the first floor windows were boarded up.

Another witness testified that he knew Cherry to be a deer hunter who hunted in Potter and McKean Counties and that he had asked someone to give Cherry a ride back to Philadelphia the night after the fire. A Mrs. Whitman testified that Mr. Cherry was an avid hunter and that she saw him before the fire; she stopped at the hunting lodge Friday before the fire but did not see any beakers, flasks or laboratory equipment, nor did she smell any ammonia or other unusual odor. She also said that Cherry did not got hunting with her on the first day of the season, November 30, because he told her Berthelot was pretty drunk and acting weird. Another neighbor testified that he was hunting nearby, that he observed smoke coming from the house, and that he saw flames coming from a location of the house different than testified by Government witnesses. Finally, Investigator Kolins identified photographs taken by him.

The jury apparently believed that there was no evidence connecting Cherry and Berthelot to the manufacture of methamphetamine, since they found both defendants not guilty on the second count of the indictment charging them with manufacturing that substance. However, they did find both of them guilty of conspiracy. Timely post-verdict motions were argued and denied, and as already noted, both defendants were sentenced to the maximum sentence permissible under the statute, even though neither one had a significant prior criminal record. Appeals were timely filed, and were briefed jointly, but oral argument was denied by the Court of Appeals, which then affirmed the convictions, citing this Court's decision in *Michigan v. Clifford*, -U.S.-, 79 L.ed.2d 477 (1984). That decision had been announced after the briefs had been filed by Cherry and Berthelot, as well as by the Government, but before the date scheduled for disposition of the case by the Court of Appeals. A timely petition for rehearing, seeking leave to argue the applicability of the *Clifford* case, was denied.

REASONS FOR GRANTING THE WRIT

1. Where firemen have already extinguished a blaze in a residential property, but remain on the premises for "mop-up" operations, a warrantless and nonconsensual seizure of items is not valid where the firemen have no reasonable belief that the items are contraband or evidence of arson, but merely seem to be "out of place."

This Court, in *Michigan v. Tyler*, 436 U.S. 499 (1978), concluded that under the Fourth Amendment owners of property retain a privacy interest in their premises despite a fire, but that the fire creates sufficient exigent circumstances to justify an exception to the warrant requirement, permitting firefighters to look for the cause of the fire. However, once the fire has been extinguished, the exigency disappears and any further search requires a warrant. Just last term this Court, in *Michigan v. Clifford*, -U.S.-, 78 L.ed.2d 477 (1984), reiterated the strong privacy interest which exists in a private residence. This Court refused to extend *Tyler* to a warrantless and nonconsensual search of a fire-damaged home conducted by arson investigators after the fire had been extinguished and fire officials and police had left. The case at bar raises the question of whether a warrantless and nonconsensual search, conducted by firemen after they have extinguished the fire, while they are still on the premises, is valid where they seize objects not because they had reason to believe the objects were related to the cause of the fire, but because the objects seemed to be "out of place."

After the fire had been extinguished at the Annin Road premises, Fire Chief Brundage and other firemen, who were engaged in mop-up operations, seized various items from the debris without obtaining any type of warrant, or the consent of anyone (including Mr. Bertholet or Mr. Cherry). By pre-trial motion, Petitioner Cherry sought to suppress the warrantless and nonconsensual search, but the motion was denied, and the evidence was admitted at his trial. Mr. Brundage testified that he

seized glass flasks, glass tubes, and other items that he had never seen before but that he later learned were heating mantels. Brundage admitted during direct examination that he looked for something out of place and the items he seized were "something I never — I did not know what it was . . ." (R.47a). He admitted he seized the items because he did not know what they were (R.46-47a). Brundage repeated these statements on cross-examination, testifying:

> By Mr. McBrien:
>
> Q. And it is your testimony, Mr. Brundage, you have never seen these items. They looked out of place to you because you had not seen them before?
>
> A. Correct.
>
> Q. I am referring to the glass beakers, the heaters, and the tubes.
>
> A. That is right.

(R.53a)

From this testimony it is incontrovertible that Brundage did not seize the various items because he knew or because it was readily apparent that the items were evidence of arson or some other crime, or because they were contraband. Rather, these were items that were not readily apparent as anything to Brundage. Brundage testified that the items seized "were just out of place . . ." (N.T. 33). Brundage did say that he thought that these might help in the arson investigation, but he did not have a particular reason for this except that he was curious about the items (R.68a).

In *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), this Court held:

> "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry reasonable. Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this

> purpose, *firefighters may seize evidence of arson that is in plain view. Coolidge v. New Hampshire,* 403 U.S. 443, 465, 466, 91 S.Ct. 2022, 2037-2038, 29 L.Ed.2d 564." (Emphasis supplied).

Thus, a seizure of evidence of arson which is in plain view would fall within one of the exceptions to the warrant requirement.

In *Tyler* this Court stated that the rationale behind this exception to the warrant requirement is that fire officials are charged not only with extinguishing fires, but with finding their causes, because prompt determination of the fire's origin may be necessary to prevent its recurrence. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. *Michigan v. Tyler, supra,* 436 U.S., at 510.

After a joint brief had been filed on behalf of Petitioner Cherry and his co-defendant Bertholet, a response had been filed by the Government, and a joint reply brief thereafter filed, this Court decided *Michigan v. Clifford, supra.* Although counsel for Petitioner and for his co-defendant had requested oral argument, the Court of Appeals denied this request, and then filed its opinion in which the issue in controversy was addressed in the following three sentences:

> "The glass beakers, heaters, and tubes discovered by Fire Chief Brundage at the scene immediately after the fire had been brought under control were properly admitted into evidence. The items were seized while the fireman was surveying the rubble for the cause of the fire. Under these circumstances, the items could properly be admitted into evidence as relevant to criminal conduct. *Michigan v. Clifford,* 52 U.S.L.W. 456 (Jan. 10, 1984); *Michigan v. Tyler,* 436 U.S. 499 (1978)." (Appendix A, *infra,* p.A3.)

Counsel sought rehearing, believing that the panel decision is contrary to the decision of this Court in *Clifford*, and requested the opportunity of presenting oral argument on that point; however, reargument was denied.

As noted in *Clifford*, once the cause of the fire is known, the continued search of other portions of the house could only be for purposes of gathering evidence of the crime. Absent exigent circumstances, such a search requires a *criminal* warrant (78 L.ed.2d, at 483-484). Here, although the cause of the fire may not have been known, the fire had been extinguished, and the exigent circumstances had terminated. No new exigent circumstances had arisen. When Fire Chief Brundage seized those items he was doing exactly what this Court stated in *Clifford* requires a warrant, namely, seeking evidence of criminal activity.

As previously noted by this Court, once the exigency has ended, a warrant must be obtained for any search exceeding the scope of the original exigency. *Mincey v. Arizona*, 437 U.S. 385 (1978). Thus, in *United States v. Parr*, 716 F.2d 796 (11th Cir. 1983), the Eleventh Circuit held that a policy of fire officials to seek out and salvage valuables without an administrative warrant violates the Fourth Amendment and does not fall within the exigency exception of *Tyler*. If the need to secure valuables against looters is not an exigency undercutting the necessity of a warrant to safeguard the substantial privacy interests implicated by entry into a person's home by a governmental official, then certainly a search for evidence of crime after the fire has been extinguished is less justified as an exception.

Nor can the search be sustained as a "plain view exception." In *Texas v. Brown*, -U.S.-, 75 L.ed.2d 502 (1983), this Court last year noted that a police officer need not "know" that certain items are contraband or evidence of crime provided that, applying a common

sense standard, the facts available to the officer would "warrant a man of reasonable caution in the belief . . . that certain items may be contraband or stolen property or useful as evidence of a crime; . . ." 75 L.ed.2d, at 514. Here, however, Chief Brundage only believed that the items were "out of place." He had no reasonable grounds to believe, and did not believe, that they were contraband, stolen property, or evidence of a crime, and certainly not of arson, as required by *Tyler* and *Clifford*. In fact, they were found in the southwest area of the premises, whereas he determined that the fire had started in the east/northeastern portion of the building.

Accordingly, this Court should review to determine whether the seizure here involved constitutes an unwarranted extension of *Tyler*.

2. Where a residue of drugs and drug paraphernalia is found in the ruins of a property extensively damaged by fire, a conviction based on Petitioner's mere presence at the premises prior to the fire violates due process.

This Court, in *In Re Winship*, 397 U.S. 358, 364 (1970) has set forth the constitutional guidelines for sustaining a conviction under the due process clause of the Fourteenth Amendment. It has mandated that a criminal defendant may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding". *Id*, at 363. At the same time, the requirement of proof beyond a reasonable doubt is bottomed on a fundamental value determination of our society that "it is far worse to convict an innocent man than to let a guilty man go free." *Id*, at 372.

This Court has, of course, held that the Fifth

Amendment due process requirements are equally stringent. See *United States v. Romano*, 382 U.S. 136 (1965); *Tot v. United States*, 319 U.S. 463 (1943). Furthermore, this Court has never subsequently strayed from the *Winship* understanding of the central purposes that a reasonable doubt standard serves. See *Jackson v. Virginia*, 443 U.S. 307 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977). It follows that when the record evidence in a case cannot reasonably support a finding of guilt beyond a reasonable doubt, a conviction cannot constitutionally stand. *Jackson v. Virginia, supra*, at 318.

In the case at bar, the Petitioner and his co-defendant were both found guilty of conspiracy, but both were found not guilty of the substantive charge of manufacturing a controlled substance. The jury apparently believed that the Government had not proved beyond a reasonable doubt that the substance involved was methamphetamine or that Petitioner and his co-defendant were connected with it. In *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978), the Fifth Circuit, referring to a similar jury verdict, stated:

> "There is nothing necessarily consistent, in law or logic, with such a result and we do not hold that a conviction for conspiracy and acquittal of the substantive offense may never properly arise from the same facts and trial. We do suggest, however, that such a result should engage our judicial skepticism. A critical analysis of the facts is required when such a contrarity of results does appear. Viewing the slippery facts and the speculations necessary to uphold this conviction in this spirit, we find the syrup of proof simply too thin."

The legal requirements for sustaining a conviction in a drug conspiracy have been well stated in *United States v. Bland*, 653 F.2d 989, 996 (5th Cir. 1981) (emphasis supplied):

> "For a defendant to be convicted of conspiracy under 21 USC, Section 846, there must be proof *beyond a reasonable doubt* that a conspiracy existed, that the accused knew of it, and with that knowledge, voluntarily became a part of it. *United States v. Navar,* 612 F.2d 1156, 1159 (5th Cir. 1980); *United States v. Harbin,* 601 F.2d 773, 781 (5th Cir. 1979). Moreover, conspiracy to commit a particular substantive offense cannot exist without at least that degree of criminal intent necessary for the substantive offense itself. *Ingram v. United States,* 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed 2d 1503 (1959); *United States v. Malatesta,* [590 F.2d 1379 (5th Cir. 1979)]."

The Third Circuit has spelled out the requirements for sufficiency of evidence in conspiracy cases. In *United States v. Kates,* 508 F.2d 308 (3rd Cir. 1975), the Court reversed a conviction for conspiracy to defraud the United States and an agency thereof in violation of 18 U.S.C. §371, stating:

> "Furthermore, a formal agreement need not be established; rather, a defendant's involvement in the conspiracy may be inferred from circumstantial evidence [footnote omitted]. The Government need not show that the defendant participated in every transaction [footnote omitted] or even that he knew the identities of his alleged conspirators [footnote omitted] or the precise role which they played [footnote omitted]." 508 F.2d, at 310.

The Court went on to state:

> "It is imperative, however, that we keep in mind the essential nature of what a conspiracy is in general and what this particular conspiracy was proven to be. *It is well established that the "gist" of a conspiracy is an agreement* [footnote omitted]. However slight or circumstantial the evidence may be, it

> must, in order to be sufficient to warrant affirmance, *tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged co-conspirators.*" *Ibid* (emphasis supplied).

Further, in *United States v. Cooper*, 567 F.2d 252 (3rd Cir. 1977), the Court applied these principles and held that a passenger in a rental truck containing contraband in its rear compartment could not be found guilty of conspiracy with the driver and a third person, despite evidence that he rode in the truck and shared a motel room with the driver.

In the case at bar, the Third Circuit found a "nexus" between the Petitioner and the crime from the mere fact that he was seen on the premises during the time of the alleged conspiracy. The entire finding of the Court was as follows:

> "At the trial, evidence was produced linking each defendant to the premises during the time of the alleged conspiracy. Berthelot admitted to being a part owner of the premises and had been seen there on several occasions during the months before the fire. Cherry had also been seen on the premises on several occasions before the fire. Their nexus with the building and the evidence supporting the production and manufacture of the drug on the premises is sufficient to have permitted a reasonable jury to have found them guilty of conspiracy. *United States v. Gypsum Co.*, 600 F.2d 414, 416-417 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979), *see also United States v. Nolan*, 718 F.2d 589 (1983)." Appendix A, *infra*, p.A3.

It should be noted that the neighbor who testified that he had seen Petitioner outside the premises once or twice prior to the fire never testified on what days he had seen Petitioner Cherry there, nor even during what peri-

od of time that had been. He also never testified that he had ever seen Cherry in the company of Berthelot, nor that he had ever seen them in or near the premises at the same time or on the same dates. Certainly, no one testified that they ever saw either of them take any joint action at all, much less take part in any illegal activity.

Thus, not only does such a finding violate the requirements of *Winship*, but it conflicts with decisions of other Circuits which have concluded that mere presence at the scene of a crime does not constitute sufficient nexus to sustain a conviction of conspiracy. *See:*

> Second Circuit: *United States v. Soto*, 716 F.2d 989 (2nd Cir. 1983); *United States v. Johnson*, 513 F.2d 819 (2nd Cir. 1975);
>
> Fifth Circuit: *United States v. Henry*, 661 F.2d 894 (5th Cir. 1981); *United States v. Fitzharris*, 633 F.2d 416 (5th Cir. 1980); *United States v. Willis*, 639 F.2d 1335 (5th Cir. 1981); *United States v. Littrell*, 574 F.2d 828 (5th Cir. 1978); *United States v. Gutierrez*, 559 F.2d 1278 (5th Cir. 1977);
>
> Eighth Circuit: *United States v. Brown*, 584 F.2d 252 (8th Cir. 1978);
>
> Ninth Circuit: *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980); *United States v. Lopez*, 625 F.2d 889 (9th Cir. 1980); *United States v. Cloughessy*, 572 F.2d 190 (9th Cir. 1977); *United States v. Peterson*, 549 F.2d 654 (9th Cir. 1977).

The *Soto* case is particularly close on its facts. In that case, a resident of an apartment used as a narcotics "cutting mill," was convicted of two counts of conspiracy to distribute narcotics. The Second Circuit reversed that conviction, holding that the fact that the defendant was a resident of the apartment, was found sleeping in the bedroom where the drugs were cut, and was present during a meeting between a person in charge of the cutting mill and a DEA agent in the bedroom where guns and drug paraphernalia were in plain view, was insuffi-

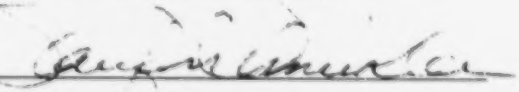
cient to establish her participation in the conspiracy. The Court noted that while the evidence need not exclude every possible hypothesis of innocence, nevertheless, where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. *Id.*, at 993. In the case at bar, as in *Soto*, the Government produced no evidence whatever linking defendant to a conspiracy. On the basis of association alone, the jurors "let their imaginations run rampant". *Ibid.* This is almost directly contrary to the Third Circuit reasoning in the case at bar.

Accordingly, this Court should review this case to determine whether the Third Circuit has sustained a conviction without proof beyond a reasonable doubt of all of the elements necessary for proof of conspiracy, as required by the due process clause of the Constitution, as interpreted by this Court in *Winship*, *Romano* and *Tot*, and to resolve the conflict between the Third Circuit and the Second, Fifth, Eighth and Ninth Circuits on the question of whether Petitioner's mere presence on the premises (upon which are found drugs, drug residues and drug paraphernalia) is sufficient to justify his conviction of a conspiracy with the alleged equitable owner of those premises, without any evidence of conspiratorial conduct between the parties.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted:



STANFORD SHMUKLER
Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5354 & 83-5404

UNITED STATES OF AMERICA

v.

JOHN M. BERTHELOT,
Appellant in No. 83-5354

FRANCIS V. CHERRY,
Appellant in No. 83-5404

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 82-95)
District Judge: Hon. Maurice B. Cohill, Jr.

Submitted Under Third Circuit Rule 12(6)
January 26, 1984

Before: HUNTER, WEIS, *Circuit Judge* and
GERRY,* *District Judge*

Filed February 9, 1984

MEMORANDUM OPINION OF THE COURT

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* The Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

WEIS, *Circuit Judge.*

Defendants Berthelot and Cherry were convicted of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §846. They appeal their convictions alleging insufficient evidence and that evidence introduced was the product of illegal searches. In addition, they allege a denial of due process because they were not permitted to test and analyze residue remaining in materials seized during by searches. They also contend that the sentences were based on materially false information.

The case began when a state police officer encountered Berthelot in a diner, bleeding from the hand, assertedly the result of a hunting accident. The trooper and a district game official accompanied Berthelot to a house in McKean County and saw Cherry on the porch. Finding the circumstances suggestive of criminal activity, the police officer went to secure a search warrant for the residence. The game official remained at the scene and was present when the house caught fire. The circumstances were such that the jury could find that Cherry set the fire to destroy evidence of the drug manufacturing enterprise.

After the flames had been extinguished, the local fire chief surveying the debris seized some glass beakers, heaters, and tubes. State police later secured a warrant based on their examination of the items that the fire chief had picked up at the scene. Additional items consistent with drug manufacturing were found and seized. Several months later, the state police once again applied for and received a warrant to search the site of the fire. Again some materials were seized during the search.

The district court denied defense motions for suppression, finding that the warrants were supported by probable cause, and not tainted by the fire chief's initial seizure on the date of the fire.

Defendants also alleged prosecutorial misconduct that merited suppression of the evidence as to the com-

position of the residue found and tested. The trial court ruled the evidence admissible and informed defendants that more residue remained that they could test if so desired. Defendants did not test the substances.

At the trial, evidence was produced linking each defendant to the premises during the time of the alleged conspiracy. Berthelot admitted to being a part owner of the premises and had been seen there on several occasions during the months before the fire. Cherry had also been seen on the premises on several occasions before the fire. Their nexus with the building and the evidence supporting the production and manufacture of the drug on the premises is sufficient to have permitted a reasonable jury to have found them guilty of conspiracy. *United States v. United States Gypsum Co.*, 600 F.2d 414, 416-417 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979), *see also United States v. Nolan*, 718 F.2d 589 (1983).

The glass beakers, heaters, and tubes discovered by Fire Chief Brundage at the scene immediately after the fire had been brought under control were properly admitted into evidence. The items were seized while the fireman was surveying the rubble for the cause of the fire. Under these circumstances, the items could properly be admitted into evidence as relevant to criminal conduct. *Michigan v. Clifford*, 52 U.S.L.W. 4056 (Jan. 10, 1984); *Michigan v. Tyler*, 436 U.S. 499 (1978).

Defendants also challenge two later searches conducted by the state police. The first is challenged as lacking probable cause based on evidence independent of materials allegedly seized illegally by the fire chief. Since we have held that these items were lawfully seized, the defendants' challenge has no merit.

Defendants contend that the third search, also conducted under a warrant, was based on stale information. The magistrate having before him an affidavit explaining weather conditions and the present description of the premises could reasonably have concluded that fur-

ther evidence still remained at the site. Hence, this search was also proper and the evidence properly admissible.

Defendants also assert prosecutorial misconduct in destruction of evidence — the residue consumed in testing and analysis. After a hearing, the trial court found that additional residue was available for testing by the defense, if desired. The mistaken belief that all residue had been consumed was corrected well before trial. We conclude that defendants have not been denied due process.

The trial court prohibited any reference to "arson" during the trial. Defendants assert that this ruling was violated by the government. The trial court's ruling was limited to the use of the term "arson" but permitted testimony about the circumstances surrounding the house fire. Defendants did not object to evidence about the blaze. The testimony did not use the word "arson," but described possible causes of the fire, including the use of an accelerant. Absent specific mention of the word "arson," the court's ruling had not been violated.

Defendant Berthelot's final contention is that the sentencing was based on erroneous information. Counsel argued at length that the capacity of the laboratory presented in the pre-sentence report was exaggerated. The trial judge noted that the information was an opinion of a DEA officer and that the judge could not remember whether evidence on the point had been introduced at the trial. He also commented that the issues might be valid to raise with the parole board "but I do not believe that they pertain to the sentence of this court which is a matter of discretion, of course." The defendant has not persuaded us that the DEA opinion was a factor in the sentence.

After a careful review of the contentions presented on this appeal, we conclude that the defendants have failed to demonstrate error requiring reversal. Accord-

ingly, the judgment and sentence of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5354 & 83-5404

UNITED STATES OF AMERICA

v.

JOHN M. BERTHOLET,
Appellant in No. 83-5354

FRANCIS V. CHERRY,
Appellant in No. 83-5405

Present: HUNTER and WEIS, *Circuit Judges*, and GERRY, *District Judge**

ORDER CORRECTING CAPTION

It appearing that appellant, John M. Berthelot, notes in his brief that his name is misspelled, it is now ORDERED that the appellant's name in the above caption shall be changed to read "BERTHELOT."

BY THE COURT:

Date: February 9, 1984

Nos. 83-1840 and 83-1841

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN M. BERTHELOT, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS V. CHERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether fire officials properly seized drug-manufacturing equipment that they observed in petitioner Berthelot's house after they had extinguished a fire there but while they were still on the premises to check for "hot spots" and to determine the cause of the fire.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether the district court relied on misinformation in sentencing petitioner Berthelot.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1840

JOHN M. BERTHELOT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1841

FRANCIS V. CHERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1984. A petition for rehearing was denied on March 12, 1984. The petitions for a writ of certiorari were

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[1]"Pet. App." refers to the Appendix to the Petition in No. 83-1841.

filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners each were convicted of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 846, and sentenced to five years' imprisonment. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A5).

The evidence showed that in July 1981, petitioner Berthelot purchased a residence on Annin Creek Road in McKean County, Pennsylvania (Tr. 560-567, 580). Following the purchase, he covered all the windows on the lower level of the house with boards and installed a fan in the kitchen window (Tr. 582-583). Over the next five months, Berthelot's vehicle was observed in front of the residence on a daily basis, and from time to time Berthelot was seen working outside the house (Tr. 488-499). During that same period, petitioner Cherry also was observed outside the house (Tr. 488-489).

On November 30, 1981, petitioner Berthelot, waving a hammer, ran off the porch of the house in front of a moving vehicle, forcing it to stop. He jumped into the vehicle and put his foot on the gas pedal, all the time screaming at the driver, Norman Henton, that somebody was shooting at his house. As the vehicle proceeded on its way, Berthelot took a rifle from the seat of the car and threatened to shoot a woman who was driving behind Henton and Berthelot, but Henton dissuaded him from doing so. Each time a car passed, Berthelot ducked down for fear he would be shot. Tr. 483-488. When the car reached a local diner, Berthelot had the diner's owner call the police (Tr. 485).

When Trooper William Hill of the Pennsylvania State Police arrived at the diner, he noticed that petitioner Berthelot was acting confused and that his hand was bleeding. Berthelot told Hill that he had been in a hunting accident. Tr. 326-330. Hill called in Game Protector James Rankin, who was charged with investigating hunting accidents, and the two men asked Berthelot what had happened, but Berthelot stated that he did not know (Tr. 331-332).

Officer Hill, Game Protector Rankin, and petitioner Berthelot later went to Berthelot's residence. As they approached the front porch, petitioner Cherry came out of the house. Hill noticed that some of the upstairs windows were broken and that there were bloodstains on the curtains, which were blowing in the wind. Upon being questioned by Hill, Cherry stated that he did not think there had been a hunting accident. Berthelot then changed his story and stated that he had had a fight with somebody named Tom, who had since departed in his own vehicle. Hill placed Berthelot under arrest for giving a false report. Tr. 337-339.

After petitioners denied Officer Hill permission to look around the house, Hill stated that he was going to obtain a search warrant. Hill then left with petitioner Berthelot to place a call to his station house, and petitioner Cherry reentered the house (Tr. 341). A few minutes later, Game Protector Rankin heard a noise coming from the house that sounded like furniture being dragged across the floor (Tr. 414).

When Officer Hill returned from making his call, he once again, in the presence of both petitioners, stated that he was going to obtain a search warrant for the house (Tr. 403). After Hill left, petitioner Cherry reentered the house. A few minutes later, Game Protector Rankin noticed smoke and then flames arising from the house (Tr. 412). Thereafter, Cherry came out of the house carrying a hunting rifle and

informed Rankin that the house was on fire. Cherry did not appear to be upset but merely walked up the road a bit and then stopped. Tr. 415-417.

The local fire department responded to the alarm and extinguished the fire. While checking for "hot spots" and conducting a preliminary investigation into the cause of the fire, Fire Chief Lawrence Brundage observed partially or totally damaged flasks, distilling tubes, transformers, gas masks, and heating units among the debris (Tr. 7-8), as well as a bottle of 190 proof grain alcohol (Tr. 520). Brundage seized these items and turned them over to the fire marshal (Tr. 9, 33-34).

Subsequently, law enforcement officers, acting pursuant to search warrants, seized additional laboratory equipment from the house (Tr. 672-675; C.A. App. 117, 124). The equipment seized was of the type used in the manufacture of methamphetamine (Tr. 697-706) and, indeed, traces of that drug were detected in several flasks and condenser tubes (Tr. 646-647).

ARGUMENT

1. Petitioners contend (83-1840 Pet. 25-34; 83-1841 Pet. 10-14) that Fire Chief Brundage violated their Fourth Amendment rights when he seized the laboratory equipment in the aftermath of the fire. They do not dispute that, once the fire was extinguished, the fire officers were entitled to remain on the premises to check for "hot spots" and to conduct an investigation into the cause of the fire. See *Michigan* v. *Clifford,* No. 82-357 (Jan. 11, 1984), slip op. 5 (plurality opinion); *Michigan* v. *Tyler,* 436 U.S. 499, 509-510 (1978). Nor do petitioners appear to dispute that fire officers may seize evidence of the cause of a fire or of independent criminal activity lawfully observed while on the premises. *Ibid.* Rather, petitioners argue that the seizure of the laboratory equipment was unlawful because Fire

Chief Brundage had no reason to believe that the seized items were connected to the cause of the fire or to any illegal activity.

In our submission, Fire Chief Brundage had ample cause to believe that the laboratory equipment might be relevant in determining the cause of the fire. As a result of his initial investigation, Brundage was unable to determine the cause or origin of the fire. Although he was unaware of the events leading up to the fire, he had been told by other officials that the fire was suspicious. Tr. 21. In short, Brundage could not rule out the possibility of either accident or arson. Given the nature of the items seized — beakers, distilling tubes, heaters, gas masks, 190 proof grain alcohol — it was not unreasonable for Brundage to conclude that the occupants of the house were engaged in some sort of activity — he thought they might be distilling liquor (Tr. 544) — which either caused the fire or provided a motive for the occupants or someone else to set the fire.[2] Accordingly, Brundage acted properly to preserve items that could help illuminate the cause of the fire by removing them from the rubble.[3] See

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[2]Petitioner Berthelot appears to suggest (83-1840 Pet. 30-31) that Brundage had no right to search the dining room, where the laboratory items were observed in plain view, after he determined that the fire had started in another part of the house. To be sure, in *Michigan* v. *Clifford*, slip op. 10, the plurality indicated that once investigators have determined the cause of a fire and located its place of origin, a search of other portions of the premises may be conducted only pursuant to a warrant. But here Brundage had not determined the cause of the fire when he observed the laboratory equipment in the dining room. The fact that the fire started in one part of the house certainly does not mean that evidence of its cause would not be found elsewhere on the premises. Moreover, Brundage had entered the dining room at least in part for the purpose of putting out "hot spots." It cannot seriously be contended that this was improper. See *id.* at 6 n.4.

[3]Indeed, we question whether petitioners could have had a reasonable expectation of privacy in the remains of the premises after the fire. As this Court noted in *Michigan* v. *Clifford*, slip op. 5 (plurality opinion), "[s]ome fires may be so devastating that no reasonable privacy interests

Michigan v. *Tyler*, 436 U.S. at 510 ("[i]mmediate investigation may also be necessary to preserve evidence from intentional or accidental destruction"). His ignorance of the precise purpose to which the laboratory equipment had been put did not render his action any less reasonable under the circumstances.[4]

2. Arguing that the government's proof established at most their presence at a house where methamphetamine was manufactured and petitioner Berthelot's part ownership of the house, petitioners challenge the sufficiency of the evidence supporting their conspiracy convictions (83-1840 Pet. 45-57; 83-1841 Pet. 14-19). Contrary to petitioners' assertions, however, the evidence established significantly more than their mere ownership of or presence on the premises in question.

The evidence against petitioner Berthelot showed that in July 1981 he purchased the house on Annin Creek Road in his mother's name (Tr. 560-567, 579-580, 584) and that he had an ownership interest in the house (Tr. 362); that after

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remain in the ash and ruins, regardless of the owner's subjective expectations." Here, the evidence showed that the fire reduced the premises to rubble (Tr. 671-672), a fact that petitioners themselves acknowledge (83-1840 Pet. 12; 83-1841 Pet. 6).

[4]Brundage's seizure of the laboratory equipment may also be sustained under the inevitable discovery doctrine. See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). Petitioners do not contend that Brundage would have violated their Fourth Amendment rights had he merely made a list of the items he observed. And while the significance of those items was not immediately apparent to Brundage, the state police officers with whom Brundage was in immediate contact would have known from Brundage's description of the items that they were of the type normally used in an illegal drug operation (Tr. 87-88). Thus, the officers could have applied for and obtained a search warrant based on Brundage's reported observations. In circumstances in which the search that leads to discovery of evidence was lawful, the premature seizure should not provide a basis for suppressing what would in any event ultimately have been seized.

purchasing the house he boarded over all the windows on the lower floor and installed a hooded fan over one of the kitchen windows (Tr. 582-583); that the chemicals used in manufacturing methamphetamine produce strong odors and that one way of dealing with the odors is to blow them out of doors by means of a fan (Tr. 708); that vehicles belonging to Berthelot were observed parked in front of the house on a continuous basis from July through November, 1981 (Tr. 489-490); and that on several occasions during that period Berthelot was observed working outside the house (Tr. 488). This evidence — together with the proof that the laboratory equipment was found in plain view in the kitchen and dining room of the house — was sufficient to implicate Berthelot in a scheme to manufacture methamphetamine.[5]

The evidence against petitioner Cherry likewise was sufficient to implicate him in the scheme. It showed that Cherry had been observed at the house prior to November 30, 1981 (Tr. 488-499); that he was present when Officer Hill stated that he was going to obtain a search warrant for the house (Tr. 340-341); that soon thereafter he was heard dragging something across the floor of the house (Tr. 447); that he was alone in the house when, moments later, the fire started (Tr. 412-413); that when he emerged from the house he was very calm and just stood in the road instead of seeking help (Tr. 454); and that, in the opinion of the fire marshal, the fire had been set (Tr. 756-757). From this evidence, the jury was entitled to conclude that Cherry had set the fire in order to destroy the evidence of methamphetamine manufacturing and therefore that he was a participant in the manufacturing scheme. See *United States* v.

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[5]In addition, Berthelot's strange behavior on the day of his arrest strongly suggests that he had ingested a narcotic; neither Officer Hill, Game Protector Rankin, nor the driver of the vehicle that Berthelot commandeered noticed the odor of alcohol on his breath (Tr. 356, 397, 491).

Mastropieri, 685 F.2d 776, 790-791 (2d Cir.), cert. denied, 459 U.S. 945 (1982); *United States* v. *Castillo*, 615 F.2d 878, 885 (9th Cir. 1980); *United States* v. *Freeman*, 498 F.2d 569, 576 (2d Cir. 1974).

In short, the court of appeals correctly determined that petitioners' challenge to the sufficiency of the evidence lacked merit (Pet. App. A3), and that fact-bound determination does not warrant this Court's review.[6]

3. Petitioner Berthelot's presentence report contained the opinion of the DEA agent who investigated this case that, based on the nature of the equipment found, the methamphetamine laboratory operated by petitioners was capable of producing 136,000 to 400,000 dosage units of methamphetamine every five hours and three to six pounds a week. Arguing that there was no factual basis for this opinion nor any reliable means for determining the capability of the drug laboratory, petitioner Berthelot contends (83-1840 Pet. 35-44) that his right to due process was violated insofar as the district court relied on the agent's opinion in imposing sentence.

In support of his claim, Berthelot cites cases suggesting that a defendant is entitled to relief when there is a significant possibility that the sentencing decision rested on

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[6]In passing, petitioners suggest (83-1840 Pet. 47-48; 83-1841 Pet. 15) that their acquittal on the substantive charge of manufacturing a controlled substance indicates that the evidence was insufficient to support their conspiracy convictions. But there is nothing necessarily inconsistent in convicting a defendant on a conspiracy count while acquitting him on the underlying substantive offense. Here, for example, the jury could have found that although petitioners had entered into an agreement to manufacture methamphetamine, they never actually manufactured the drug or that they did so in a de minimis amount not warranting conviction. In any event, few principles of criminal law are as well established as the rule of *Dunn* v. *United States*, 284 U.S. 390, 393, 394 (1932), that "[c]onsistency in the verdict is not necessary * * *. [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]." See also *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981); *Hamling* v. *United States*, 418 U.S. 87, 101 (1974).

misinformation. See *United States* v. *Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States* v. *Bass*, 535 F.2d 110, 118 (D.C. Cir. 1976); *McGee* v. *United States*, 462 F.2d 243, 247 (2d Cir. 1972). Here, the trial judge expressly noted at sentencing that the information concerning the capability of the laboratory was merely an opinion of the DEA agent and that the judge could not remember whether any evidence on the point had been introduced at trial. The trial judge added that while the issue might be worth raising with the parole board or in a legal proceeding relative to the issue of parole, it was not "per[tinent] to the sentence of th[e] court which is a matter of discretion * * *" (C.A. App. 318-319). Even assuming that the agent's opinion was erroneous, it is clear from the judge's statements that that opinion was not a factor in the sentence, and the court of appeals' finding to that effect (Pet. App. A4) does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

STEPHEN S. TROTT
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JOEL M. GERSHOWITZ
Attorney

JULY 1984

DOJ-1984-07